1930

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE UNITED STATES, Appellant,

vs.

THE MINIDOKA & SOUTHWESTERN RAILROAD COMPANY, a Corporation, and THE UTAH CONSTRUCTION COMPANY, a Corporation, Appellees.

Appellant's Reply Brief to Appellees' Petition for Rehearing.

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This cause was head by your Honors in February and decided in September, 1911, after what has evidently been a lengthy and very careful consideration of the issues involved.

The question involved in this case is of vital and far-reaching importance to the Government in the operations of one of its most important branches. In its last analysis, the question here presented amounts to this: Has the Government sufficient control over its public lands and irrigation works so that when it has withdrawn public land for irrigation and reclamation and has constructed an irrigation system to reclaim the same at a cost of millions of dollars, no part of which has been repaid, it may prevent the destruction of the irrigable area of the project

by piecemeal or as an entirety and the occupation of the right of way of its canals by a corporation which has taken possession without the consent of the Government, and is admittedly destroying the irrigability and the agricultural value of that portion of the project which it has so appropriated, and is building structures in and across the Government canals?

Under these conditions, we feel that we should not fail to reply to the Petition for a Rehearing, although it appears to be largely a reiteration of the arguments presented at the hearing of this case.

The first half of the Petition for Rehearing is devoted to an extended argument under the heading, "Lands Entered at Land Office Not Public Lands Subject to Act March 3, 1875." The court has held that the railroad company failed to obtain any rights under the Act of March 3, 1875, on account of its failure to comply with the plain requirement of the law, that it file its profile and obtain the approval of the Secretary of the Interior.

The railroad company argues at length that it did not obtain any rights under the Act of 1875 because land entered at the land office is not subject to that Act.

And the Government is firmly of the opinion that the railroad company failed to obtain any rights under the Act of 1875, for the reason given by the court, and also for several other reasons which will be explained later.

So it appears that while there is some difference of opinion as to the reason, there is none as to the fact and the railroad company, the Government and the court are fully agreed and in complete harmony upon the essential point, that the railroad company did not as a matter of fact obtain any rights under the Act of 1875.

That being disposed of, leaves nothing further for con-

sideration, except the question as to what rights the railroad company has acquired by purchase from the settlers under the Act authorizing a settler to convey a portion of his entry by warranty against his own acts. And this conveyance is limited by the express language of the statute to a conveyance of a portion of the interest of the settler.

The rule of construction has been stated by the Court to be:

> "A fundamental rule of construction for such a grant has long been established. This rule requires the courts to construe the grant strictly in favor of the public; nothing passes but what is granted in clear and explicit terms."

That this is a correct statement of the rule of construction has not been denied and cannot be.

To hold that by a conveyance from a settler of a portion of *his* claim by *warranty against his own acts*, a railroad company acquires the interest of the United States or any part of it, would nullify the plain language of the statute, would violate the long established and fundamental rule of construction, that "nothing passes but what is granted in clear and explicit terms," and would also violate that elementary rule of all real property law, which denies to any person holding a partial interest in real property the right to convey a greater interest than he himself possesses. He may not be able to convey all that he possesses. The homesteader can not convey indiscriminately, neither can a tenant for years under certain leases. But he certainly could not convey more than he possesses. The Supreme Court has held that the homestead entryman has a possessory right and occupies a position similar to that of a tenant for years or for life while the Government holds

the fee and occupies a position similar to that of the lessor or remainderman.

Shiver vs. United States, 159 U. S. 491, 40 L. Ed. 231.

It requires no argument to show that a deed from a tenant for years or for life could not suffice to dispose of the interest of the lessor or remainderman.

> *"Effect of Estates for Life or Years on the Right to Damages.* Any person having an interest in property may recover for any damage to his interest. A tenant may recover for injury to his crops or to his leasehold. In the New York Elevated Railroad cases, it is held that where there is an outstanding estate for life or years at the time the road is built, the damages to rental value belong to the owner of such estate, but the existence of such an estate does not prevent the owner of the fee or reversion from recovering the permanent or fee damages in a suit to enjoin the operation of the road."
>
> Lewis on Eminent Domain, 3d Edition, Par. 950 (653d) and numerous cases there cited.

The stipulated facts in regard to the nature and effect of the acts being performed by the railroad company are very clear and are as follows:

On page 89 of the transcript:

> "Fourth. That all the lands under said Minidoka Project and the extension thereof are arid in character, and require irrigation to produce argricultural crops thereon, but are productive when irrigated."

On page 93 of the transcript:

> "Nineteenth. That under the provisions of said Reclamation Act of June 17, 1902, the complainant has expended in excess of $1,300,000.00 in the construction of the irrigation works for the irrigation of

the lands lying under said South Side Minidoka Pumping Project, a portion of which is the land above described, which is now being taken possession of, excavated and thrown up into a railroad grade by said railroad company."

On page 94 of the transcript:

"Twenty-one. That the said lands now being occupied and excavated by said railroad company as a railroad grade are in their natural condition well suited for irrigation and cultivation."

"Twenty-two. That by said excavation and the construction of said railroad grades, and the digging out of said borrow pits said lands now being occupied and graded into a railroad grade are rendered unsuitable and worthless for irrigation and agricultural purposes."

These are acts which would undoubtedly constitute waste if done by a tenant for years or for life.

"The conversion of land from one species to another is waste in England; as to turn arable land into pasture or meadow, or meadow into arable, or arable into woodland, are all of them waste. In this state the question of waste depends upon the fact whether the injury to the land works a permanent or present injury to the freehold. Surely, then, the turning of arable land, not into woodland, but to the uses of a highway, to be trampled upon and cut up by the feet of horses and the wheels of vehicles, would be waste much more serious and injurious to the freehold than turning it into woodland, or to a different species of husbandry."

Dills vs. Hampton, 92 N. C. 565.

"Waste is the destruction or material alteration of any part of a tenement by a tenant for life or years, to the injury of the person entitled to the inheritance. (1 Steph. Comm. 241.) And it may be committeed as well by destruction to any part of a tenement. It is waste to alter buildings, or vary in any manner, the permanent erections. (5 Wait, Act & Def. 239; Tayl. Landl. & T. 348.) The injury to the realty must be

of a permanent character—some act which does a lasting injury to the property or tends to destroy its identity; and this may be accomplished by any alteration of the property which is material and of a substantial nature."

Davenport vs. Magoon, 4 Pac. 299, 301, 13 Or. 3, 57 Am. Rep. 1.

Beekman vs. Van Dolson, 18 N. Y. Supp. 376, 377, 63 Hun. 487.

McGregor vs. Brown, 10 N. Y. 114, 117.

Hamilton vs. Austin, 36 Hun. 138, 143.

Eysaman vs. Small, 15 N. Y. Sup. 288, 289, 61 Hun. 618.

Price vs. Ward, 58 Pac. 849, 850, 25 Nev. 203, 46 L. R. A. 459.

Proffitt vs. Henderson, 29 Mo. 325, 327.

Whitney vs. Huntington, 34 Minn. 458, 462.

Dills vs. Hampton, 92 N. C. 565.

All authorities agree that while a homestead entryman has a right of possession and may or may not at some future time become entitled to a patent he has not such an interest as will permit him to commit waste on the premises.

Shiver vs. United States, 159 U. S. 491, 40 L. Ed. 231.

United States vs. Taylor, 35 Fed. 484.

United States vs. McEntee, 23 Int. Rev. Rec. 368.

United States vs. Nelson, 5 Sawy. 68.

The Timber Cases, 11 Fed. Rep. 81.

United States vs. Smith, 11 Fed. Rep. 493.

United States vs. Stores, 14 Fed. 824.

United States vs. Yoder, 18 Fed. 372.

United States vs. Williams, 18 Fed. 475.

United States vs. Lane, 19 Fed. 910.
United States vs. Freyburg, 32 Fed. 195.
United States vs. Murphy, 32 Fed. 376.
United States vs. Cook, 86 U. S. 19 Wall 591.

The railroad company's assertion that, "if the entryman himself desires to build a railroad from one corner of his land to the other there would be no power resting in the Government to prevent it," is not supported by authority and is not the law. If the entryman were himself doing those acts which the railroad company is doing, he would be committing waste and the Government would not be without a remedy.

Shriver vs. United States, 159 U. S. 491, 40 L. Ed. 231.

As to the Cases Cited In the Petition for Rehearing.

Under the heading, "Lands Entered at Land Office Not Subject to Act of March 3, 1875," the appellees have quoted passages from a number of decisions of the Land Office and some from the courts in which it has been held that where public lands are occupied by settlers, whether they be homestead entryment, pre-emption entrymen, or merely squatters or occupants of the public lands, the lands so occupied can not be taken by a railroad company under the Act of March 3, 1875, without purchasing or condemning the possessory rights of the settlers. In this connection, Section 3 of the Act is usually quoted by the courts—

> "That the Legislature of the proper territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned,"

as showing the intention of Congress that the possessory rights of settlers on the public lands may not be appropriated by a railroad company without payment.

The principle involved in this class of cases is in entire harmony with your honors' decision, which is that both the settler and the Government are interested in the land included in a Reclamation Homestead Entry, the settler having the possessory right subject to certain conditions and privileges and the Government holding the fee, and that the railroad company must acquire the rights of both before it can have a complete title. The decision on this point is:

> "These two statutes taken together appear to meet the requirements of the situation, and to authorize the railroad company upon complying with certain conditions to acquire from both the Government and the settler a right of way which the Government should not in justice to the settler grant without his consent, and which the settler could not convey without the permission of the Government since he can only transfer by warranty against his own acts."

The fact that the courts protect the settler by requiring purchase or condemnation of his possessory right as provided in Section 3 of the Act of 1875, is certainly no reason why they should not protect the fee title interest of the Government by requiring compliance with the plain provisions of Section 4.

If Section 4 were intended to be considered merely permissive for the purpose of obtaining advance rights, as argued by the railroad, it would read, "That any railroad company desiring to secure the benefits of this act *in advance of construction may file, etc.*" But such is not the language of statute. The statute provides:

> "That *any* railroad company desiring to secure the benefits of this act, *shall* file, etc."

This is not language which would be consistent with the view that the public lands can be secured under this act without filing.

And the Supreme Court has decided that compliance with Section 4 is necessary .

> "A right of way is granted but to secure it three things are necessary: (1) Location of the road; (2) Filing of profile of it in the local land office; and (3) The approval thereof by the Secretary of the Interior to be noted upon the plats in the local office. It is after these things are done that the statute fixes the right of the railroad."
>
> Minneapolis R. Co. vs. Doughty, 208 U. S. 251.

> "And thereafter are the words of the statute, 'all such lands over which such right of way shall pass shall be disposed of subject to such right of way.' It would be a free construction of these words to give them the meaning for which the railroad company contends. They neither convey an unnatural sense nor lead to an unnatural consequence. Unless rights under the Act of 1875 and rights under the land laws were to be kept for an indeterminate time in uncertainty and possible conflict, to fix some act or point of time at which they should attach was natural, and to construe language which is apt and adequate by its sense and arrangement to express one thing to mean another would be pretty free exercise of construction."
>
> Minneapolis R. Co. vs. Doughty, 208 U. S. 251.

And such also appears to be the view taken by the State courts. Referring to the question whether a homestead is such public land as may be taken by a railroad company, without compensation to the entryman, the Oregon court says:

> "It may well be doubted whether this question is presented by this record, for the reason that it does not appear that the appellant has filed with the Secretary of the Interior a copy of its Articles of Incorporation and due proofs of its organization under the

same, as required by the first section of the Act; nor does it appear that it ever claimed the benefits of said act *as required* in the fourth section, *by filing with the register of the land office of the proper district a profile of its road, or that the same was ever approved by the Secretary of the Interior. These are plain requirements of the act; and without entering at large* upon their discussion at this time, I think it sufficient to say that, before the appellant could acquire any rights under the Act as against one in possession of the land in question, it must show a compliance with its terms."

Larsen vs. Oregon R. & Navigation Co. 23 Pac. 974.

"The fourth section requiries it within a certain time to file with the register of the land office, for the district where such land is located, a profile of its road; and upon approval thereof by the Secretary of the Interior that it shall be noted on the plats in the land office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way. This is not in the nature of an absolute grant in praesenti to a designated company as in the case Railroad Co. vs. Baldwin, 103 U. S. 426, where it was held that as soon as the route was definitely fixed the title attached from the date of the Act. This Act is in the nature of a general offer to the public *which takes effect* and *becomes operative as a grant to a particular company* only when it accepts its terms by a compliance with the conditions precedent prescribed in the act itself."

Red River, etc., R. R. Co. vs. Sture, 32 Minn. 95, 20 N. W. 229.

As to Construction of the Railroad.

Counsel for the railroad company says: "We desire to again urge upon the court our understanding of the law that it is not necessary to file a map in accordance with the provisions of Section 4 of the Act of March 3, 1875, in cases where the railroad company has placed itself in such

a position as to become specifically a grantee under the Act and has in addition to placing itself in that position actually constructed its road upon the ground."

It has never been held that as against the Government itself a railroad company can acquire any valid right under the Act of 1875 without filing the profile required by that Act. As between two private parties claiming against each other by occupation and construction on the public land, the railroad company, if it has constructed its railroad before the settlers' rights have attached by possession or entry, will be held to have the better right, and such was the decision in the case of Jamestown & Northern vs. Jones, which is cited by the appellees, but the same rule applies as between two agricultural occupants or "squatters," and yet it has been fully decided that neither of such occupants would have any right as against the Government itself.

United States vs. Hanson, 167 Fed. 881.
Frisbie vs. Whitney, 9 Wall 187.
Yosemite Valley Case, 15 Wall 77.

The settler can acquire rights against the Government only by making the required filings in the land office, and by analogy the same rule would appear to apply to a railroad company, for it has been fully decided that the rights of a prior settler, occupant, or squatter on the public lands are superior to those of a railroad company claiming under the Act of 1875 and cannot be taken without purchase or condemnation.

Washington & Ida. R. R. Co. vs. Osborn, 160 U. S. 103, 40 L. Ed. 356.

But it is equally well settled that the rights of the squat-

ter which are superior to those of the railroad company are in turn inferior to those of the Government.

United States vs. Hanson, 167 Fed. 881.
Frisbie vs. Whitney, 9 Wall 187.
Yosemite Valley Case, 15 Wall 77.

So the conclusion seems obvious that the rights of the railroad being subordinate to those of the squatter could not be considered superior to those of the Government, even if the road were completed.

And this view is sustained by the language used by the Supreme Court in the case of Minneapolis & St. P. Ry. Co. vs. Loughty, 208 U. S. 251, where the court said:

> "A right of way is granted but to secure it three things are necessary: (1) Location of the road; (2) Filing of profile of it in the Local Land Office; and (3) The approval thereof by the Secretary of the Interior to be noted upon the plats in the local office. It is after these things are done that the statute fixes the right of the railroad."

The rule of construction in a case between the Government and a private party claiming a grant from the Government is essentially different from that which might be applied as between two private parties. The fundamental rule of construction between the Government and the party claiming a grant from the Government has been long established. This rule requires the courts to construe the grant strictly in favor of the State or Government; nothing passes but what is granted in clear and explicit language.

This long established rule of construction when considered in connection with the fact that the language of the statute requiring the filing of the profile by all railroads desiring to receive the benefits of the Act is most

positive and explicit, that under the language of this statute there is no exception in favor of any railroad or class of railroads, and the words of the statute are "shall file," not "may file," and that "thereafter" the lands shall be disposed of subject to the right of way of the railroad; all of these considerations make it impossible to hold that a railroad company can acquire a valid title against the Government under the Act of 1875 without complying with the plain requirements of the act under which it claims, and such was evidently the view of the Supreme Court when it wrote:

> "It is after these things are done that the statute fixes the right of the railroad."

So far as the present case is concerned the most obvious answer to the railroad company's claim of title against the Government by reason of the actual construction of a railroad on the ground lies in the fact that the record in this case plainly shows that they have not constructed any railroad but have only partially constructed a railroad grade, and it is a matter of common knowledge that a partially constructed railroad grade or even a completed railroad grade is not a railroad.

The stipulation of facts in regard to the amount of construction done by the railroad company is as follows:

On page 92 of the transcript.

> "Fifteenth. That after the withdrawal of the above described lands as above set out, and the entry thereof by the several entrymen, the defendant railroad company went upon said lands and made surveys for a railroad line across the same from said town of Burley to said town of Oakley and let contracts for the construction thereof, and that said railroad company, and its said contractor, the Utah Construction Company, have gone upon said lands and partly constructed said railroad grade and railroad line and is

threatening to continue the same to completion and will continue the same to completion unless restrained by the order of this Court."

"Seventeenth. That said railroad construction and threatened construction consists of a railroad embankment upon which railroad ties and rails are to be laid, the borrow pits, etc."

And on page 94 of the transcript.

"Twenty-two. That by said excavation and the construction of said railroad grades, and the digging out of said borrow pits, said lands *now being occupied and graded into a railroad grade* are rendered unsuitable and worthless for irrigation and agricultural purposes."

What a railroad is is so well known that it would seem to be hardly necessary to offer definitions of the word "railroad" in order to show that a company which has partially constructed a railroad grade has not constructed a railroad.

But if definitions are desired, the following will cover the case:

Railroad. "A road graded and having rails of iron or other material for the wheels of railroad cars to run upon."—*Bouvier's Law Dictionary.*

Railroad. "A road or way on which iron or steel rails are laid for wheels to run on for the conveyance of heavy loads in cars or carriages propelled by steam or other motive power."—*Black's Law Dictionary.*

Railroad. "A road or way consisting of one or more parallel series of iron or steel rails patterned and adjusted to be tracks for the wheels of vehicles and suitably supported on a bed or substructure."—*Webster.*

Railroad means one capable of being used, not a road bed capable of receiving rails.

Troy & B. R. Co. vs. Boston H. T. & W. Ry. Co., 86 N. Y. 107.

Miller vs. Rutland & W. R. Co., 36 Vt. 452, 493.

State vs. Baltimore & O. R. Co., 48 Md. 49, 74.

"Road", as used in a mortgage by a railroad company on the road and its franchise, means the road in its completed condition, proper and ready for use in running over it in the ordinary manner of that kind of business. It was not a road—that is, a railroad—but only a roadway when it was only located between two termini and in process of construction, but in no part completed ready for use.

Miller vs. Rutland Co., 36 Vt. 452, 493.

> "In its ordinary acceptance, the term railroad fairly includes all structures which are necessary and essential to its operation."
>
> United States vs. D. & R. G. 150 U. S. 1.
>
> United States vs. Chaplin, 31 Fed. 890, 895.

The argument is made by the attorneys for the railroad company that the construction of a railroad grade fixes the location of the road and that when the location is fixed the grant passes, but this is the very argument made by the attorneys for the railroad company in the case of Minneapolis & St. P. Ry. Co. vs. Doughty.

> "Did the district court and supreme court construe this section correctly? The railroad contends against an affirmative answer, and urges that it is the location of its road which initiates a railroad company's right."

But this contention of the railroad attorneys was denied by the court in the language which has already been quoted in your Honors' opinion.

The railroad company further urges that the filing of the profile is a mere matter of form and that the Government is not entitled to an injunction, but that if an injunction should issue it should only remain in force until the map is filed and that the railroad company should not

be required to secure the approval of the Secretary of the Interior.

Such an interpretation would indeed make the filing of the map a mere formality, would give the railroad company a free hand to destroy the irrigable land of the Government project and to so change the natural conditions of the land as to make the reclamation of the remaining portion much more difficult and costly, and the Government would lose all control and all power to protect either its interest in the land itself or its investment in the irrigation works whose value must depend upon the preservation of the land in a suitable condition for irrigation.

And such an interpretation would be in direct conflict with the decision of the supreme court in the Doughty case, in which the court holds that to secure a right of way three things are necessary, and gives equal importance to the location of the road, the filing of the profile, and the approval of the secretary and declares that it is only after all of these conditions have been complied with that the right of the railroad attaches.

In regard to the definition of the word "profile," it must be admitted that the definition given by the court is the true meaning of the word and the only definition which can find support in any authority in regard to the English language. This is a common word of well known meaning and it certainly will not be presumed that Conkress did not know its meaning or did not intend it to convey its proper and well known meaning.

Where a railroad crosses an irrigation project, the profile is very necessary as it is highly important for the Government officers to know the grades of such a road in order to determine to what extent it will interfere with the Government canals and laterals. Where no Govern-

ment construction work is involved it may not be necessary that the Government should know the grade of the railroad, but the fact that in some such cases the land office has not insisted upon the filing of a profile does not deprive the Government of the right to do so, especially where, as on Reclamation Projects, conditions have arisen which make it highly important that the Government should have the information which the profile would give.

The Rights of the Homestead Entryman Are Possessory Rights.

While a homestead entryman may or may not at some future time become entitled to a patent, until he has earned the patent by compliance with the law his rights are merely possessory and the Government holds the fee title and the ownership of the land, and your Honor's opinion that "these claims are, therefore, nothing more than possessory," is correct and supported by abundant authority.

The Supreme Court has said:

> "From this resume of the Homestead Act, it is evident, first, that the land entered continues to be the property of the United States for five years following the entry, and until a patent is issued."
>
> Shiver vs. United States, 159 U. S. 491, 40 L. Ed. 231.
>
> "I charge you that the right of the homesteader is one of occupancy only, but with certain rights and privileges subject to the right and duty of the Government to protect the timber on the land."
>
> United States vs. Taylor, 35 Fed. 484.

> "Hence I charge you that the United States had when this suit was brought, and now have, such possession as entitles them to maintain this action; that the receipts of the Receiver of the Land Office are not

of themselves sufficient evidence that the Government's title has been divested, and that it has vested in the homestead claimants. Until they have made the final proof and obtained the title—that is so fulfilled their obligations under the law as to entitle them to patents—it is not allowable to them to cut the timber on the lands, or take any crude turpentine or other material therefrom for the purpose of sale or speculation."

United States vs. Taylor, 35 Fed. 484.

The case of Shiver vs. United States contains such a full and clear discussion of the rights of the homestead entryman that we will quote from it at length. It must be borne in mind, of course, that this discussion relates to the general homestead law and that under the Reclamation Act many additional limitations and restrictions are imposed.

"This case turns upon the questions as to what are 'lands of the United States' within the meaning of Revised Statute 2461, providing for the punishment of persons guilty of cutting timber upon such lands other than for the use of the navy. Obviously, the question is not whether such lands are so far withdrawn from sale as to be no longer subject to appropriation by any railroad or other person or corporation to which a land grant has been made, but whether they are still so far the property of the United States that the Government may protect itself against an unlawful use of them. Indeed, this court has settled, by repeated decisions, that the claim of a homestead or pre-emption entry made at any time before filing a map of definite location of a railway, prevents the lands covered by such claim from passing to such railway under its land grant, even though such entry be subsequently abandoned. (Kansas P. R. Co. vs. Dunmeyer, 113 U. S. 629; Hastings & D. R. Co. vs. Whitney, 132 U. S. 357; Whitney vs. Taylor, 158 U. S. 85; Sioux City & I. F. Co. vs. Griffey, 143 U. S. 32.)"

"The same principle applies where lands have been

reserved for any purpose whatever. (Wilcox vs. Jackson, 38 U. S. 13 Pet. 498; Witherspoon vs. Duncan, 71 U. S. 4 Wall 210; Newhall vs. Sanger, 92 U. S. 761; Kansas P. R. Co. vs. Atchison T. & S. Co. 112 U. S. 414.)"

"While these cases indicate that lands once appropriated to a certain purpose thereby cease to be available for another purpose, there is nothing in them to show that the United States loses its title to such lands by the first appropriation, or that they cease to be the property of the Government. Upon the contrary, it was said by this Court, as early as 1839 in Wilcox vs. Jackson, 38 U. S. 13 Pet. 498, 516, that:

'With the exception of a few cases nothing but the patent passes a perfect and consummate title.' "

So in Frisbie vs. Whitney, 76 U. S. 9 Wall. 187, 193:

"There is nothing in the essential nature of these acts (entering upon land for the purpose of pre-emption) to confer a vested right, or indeed, any kind of claim to land, and it is necessary to resort to the pre-emption law to make out any shadow of such right."

"In this case, the following extract from an opinion of Attorney-General Bates was quoted with approval:

" 'A mere entry upon land, with continued occupation and improvement thereof, gives no vested interest in it. It may, however, give, under our national land system, a privilege of preemption. But this is only a privilege conferred on the settler to purchase lands in preference to others. His settlement protects him from instrusion or purchase by others, but confers no right against the Government.'

"A number of authorities were cited to the same effect. It was held that it was within the power of Congress to withdraw land which had been pre-empted from entry or sale, though this might defeat the imperfect right of the settler.

"In Hutchins vs. Low (The Yosemite Valley Case), 82 U. S., 15 Wall 77, the construction given to the pre-emption law in Frisbie vs. Whitney was approved, the Court observing, Page 88:

" 'It is the only construction which preserves a wise control in the Government over the public lands, and prevents a general spoiliation of them under the pre-

tense of intended pre-emption and settlement. The settler being under no obligation to continue his settlement and acquire the title, would find the doctrine advanced by the defendant, if it could be maintained, that he was possessed by his settlement of an interest beyond the control of the Government, a convenient protection for any trespass and waste in the destruction of timber or removal of ores, which he might think proper to commit during his occupation of the premises.'

"The right which is given to a person or corporation by a reservation of public lands in his favor, is intended to protect him against the actions of third parties, as to whom his right to the same may be absolute. But as to the Government, his right is only conditional and inchoate. By the Homestead Act (Rev. Stat. par. 2289) certain classes of persons therein specified are entitled to enter a quarter section of land subject to pre-emption at a certain price, upon making an affidavit of facts before the Register or Receiver, including in such affidavit a statement that 'his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use and benefit of any other person.' 'By a later Act adopted in 1891 (26 Stat. at L. 1098) this affidavit is now required to state that the settler will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation, necessary to acquire title to the land applied for; that he or she is not acting as the agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation or syndicate to give them the benefit of the land entered, or any part thereof or the timber thereon.'

"By Section 2291, no patent shall issue until the expiration of five years from the date of the entry, the settler being required to prove by two creditable witnesses that he has resided upon or cultivated the land for such term of five years, immediately succeeding the time of filing the affidavit, and that no part of such land has been alienated, ecept for certain public purposes.

"By Section 2297, if, before the expiration of the five years, the settler changes his residence or abandons the land for more than six months at any

time, the land so entered shall revert to the Government; and by Section 2301, the settler may at any time before the expiration of the five years, obtain a patent for the lands, by paying the minimum price therefor, and making proof of settlement and cultivation, as provided by law, granting pre-emption rights.

"From this resume of the Homestead Act, it is evident, first, that the land entered continues to be the property of the United States for five years following the entry, and until a patent is issued; second, that such property is subject to divestiture upon proof of the continued residence of the settler upon the land for five years; third, that meantime such settler has the right to treat the land as his own, so far and so far only, as is necessary to carry out the purposes of the Act.

"The law contemplates the possibility of his abandoning it, but he may not in the meantime, ruin its value to others, who may wish to purchase or enter it.

"With respect to the standing timber his privileges are analogous to those of a tenant for life or years."

Shiver vs. United States, 159 U. S. 491, 40 L. ED. 231.

After quoting with approval from the case of United States vs. Cook, 86 U. S. 19 Wall. 591, the Supreme Court said:

"Their position (the Indians) was said to be analogus to that of a tenant for life, the Government holding the title with the rights of a remainderman."

"In the courts of original jurisdiction, it has been uniformly held that a similar rule applied to homestead entries. (United States vs. McEntee, 23 Int. Rev. Rec. 368; United States vs. Nelson, 5 Sawy. 68; The Timber Cases, 11 Fed. Rep. 81; United States vs. Smith, 11 Fed. Rep. 493; United States vs. Stores, 14 Fed. Rep. 824; United States vs. Yoder, 18 Fed. Rep. 372; United States vs. Williams, 18 Fed. Rep. 475; United States vs. Lane, 19 Fed. Rep. 910; United States vs. Freyberg, 32 Fed. 195; United States vs. Murphy, 32 Fed. Rep. 376.)"

"This general consesus of opinion is entitled to great weight as authority.

"While we hold in this case that as between the United States and the settler (homestead entryman) the land is to be deemed the property of the former, at least so far as is necessary to protect it from waste, we do not wish to be understood as expressing an opinion as to whether, as between the settler and the State, it may not be deemed the property of the settler and therefore, subject to taxation.

"As the land in question continued to be the land of the United States within the meaning of Section 2461, the first question ('Whether lands duly and properly entered for a homestead, under the homestead laws of the United States are from the time of entry and pending proceedings before the land department, and until final disposition by that department, so appropriated for special purposes, and so segregated from the public domain as to be no longer lands of the United States within the purview and meaning of Section 2461 of the Revised Statutes of the United States?') must be answered in the negative; and the second ('Where a citizen of the United States has made an entry upon the public lands of the United States which entry is in all respects regular, can such citizen be held liable in a criminal prosecution under Section 2461 of Section 5388 of Revised Statutes for cutting and removing after such homestead entry, and while the same is in full force, the standing trees and timber found and being on the land so entered as a homestead?') in the affirmative."

Shiver vs. U. S. 159 U. S. 491, 40 L. Ed. 231.

The railroad company suggests:

"We submit that the term 'possessory claims' used in the third section of the Act of 1875 does not relate to land held by homestead entrymen under a valid filing, but applies to those who, without any filing whatever, have been permitted by the Government to occupy portions of its vacant lands; a mere occupant, settler, or squatter, as they have been variously designated."

There is no support in the decisions of the courts for this assertion that the protection of this section is limited to

squatter's rights, but the courts agree in holding that this section applies alike to homesteads, pre-emptions, and squatter's rights, all of which are held to be possessory claims on the public lands.

Larsen vs. Navigation Co., 23 Pac. 974 (Or.).
Railroad Co. vs. Sture, 32 Minn. 95; 20 N. W. 229.
Wash. & Ida. R. R. Co. vs. Osborn, 160 U. S. 103, 40 L. Ed. 356.
Enoch vs. Spokane Falls & N. Ry. Co., 33 Pac. 966.

These cases and others of a similar nature which are referred to therein are interesting on account of the light which they throw upon the various uses of the term public land.

In each case the land in issue is held to be public land and not to be public land. First, that it is not public land to the extent that a railroad company might appropriate it without payment to the settler, but at the same ime, it is public land within the meaning of Section 3 of the Act, and that the rights of the settlers are possessory claims on the public lands which the railroad company is authorized by that section to condemn, but which by the implication of the same section, it may not take without condemnation or purchase.

In conclusion, the railroad company quotes from Wash. & Ida. Ry. Co. vs. Osborn:

> "On the other hand, it would not be easy to suppose that Congress would in authorizing railroad companies to traverse the public lands, intend thereby to give them a right to run the lines of their roads at pleasure, regardless of the rights of the settlers."

This quotation immediately follows the reference to the cases of Frisbie vs. Whitney and the Yosemite Valley Case in which it was held that the rights of such a settler as

Osborn are entirely inferior and subordinate to the rights of the Government itself. So that this quotation taken in this connection naturally suggests the thought; if it would not be easy to suppose that Congress intended to give the railroads a right to run the lines of their roads at pleasure, regardless of the rights of settlers, then how much more difficult would it be to suppose that Congress would intend to give them the right to run their lines at pleasure, regardless of the rights of the Government which have been held to be so far superior to those of such settlers, especially in a case where the line is being built across a Government irrigation project and may be built in such a way that the project would be largely destroyed unless the Government retains sufficient control to prevent such a result, and more especially when it is considered that this land has been previously withdrawn by the Government to accomplish this Government purpose of reclamation by irrigation and that the Government has invested millions of Government money for the reclamation thereof besides holding the title to the land itself.

The answer is found in Section 4 of the Act, which requires the filing of a profile and the approval of the Secretary of the Interior, thus giving him a wise control by which he can protect the Government property when necessary.

This closes our reply to the petition for rehearing but there are some very important issues in this case which have not yet been considered and to which we wish to again direct the attention of the court. These issues concern the nature of the Government's title to its canal system.

As to Crossings Over Government Canals.

Our understanding of the law on this subject involves two propositions:

First. The right of way reserved to the Government under the Act of Congress of August 30, 1890 (26 Stat. L. 391), is something more than a mere easement and is at least a conditional fee.

Second. That the actual occupation and use by the Government of the lands included in the Government canals was equivalent to a withdrawal under the first form of the Reclamation Act and preserves the original Government title and right of possession from the subsequent private entries just as effectively as if the land had been withdrawn under the first form of the Reclamation Act, or for an Indian or Military Reservation or any other purpose authorized by law.

As to the first point there may be some difference of opinion, but on the second point all the cases are fully agreed and the railroad company has been unable to cite a single authority in reply to the Government's contention as to the effect of the actual occupation and use by the Government prior to the entry of the private parties.

When it is shown that the Government's title to that part of the withdrawn land occupied by the canals and laterals involved in this suit, and their embankments and appurtenances, is an absolute fee simple title, it must be conceded that no railroad company may take violent possession thereof and occupy the same for its own purposes and build fences, railroad grades, bridges and other structures thereon upon a mere showing that it does not intend to obstruct the flow of the water in the ditches. Under the provisions of the Act of Congress of August 30, 1890

(26 Stat. L. 391), a right of way is reserved for ditches and canals constructed under the authority of the United States. The provision in question is as follows:

> "That in all patents for lands hereafter taken up under any of the land laws of the United States or entries or claims validated by this Act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereof for ditches or canals constructed by the authority of the United States."

Act of Congress of August 30, 1890 (26 Stat. L. 391).

Green vs. Wilhite, 14 Idaho, 238, 93 Pac. 971.

Green vs. Wilhite, 160 Fed. 755.

There has been considerable argument and some difference of opinion as to whether the right reserved to the Government by this Act is a fee or an easement. Undoubtedly there are some very strong reasons for believing that it is at least a conditional fee.

That the right of way preserved to the Government for ditches and canals constructed under its authority is a fee title appears from the construction given to the same term in other Acts of Congress. Exactly the same term is used in the Act of August 30, 1890 (26 Stat. L. 391) with respect to the right reserved to the Government for canals constructed by it as is used in the Act of March 3, 1875, with reference to the title to be conveyed to railroad companies for their construction:

> "Section 1, Act of March 3, 1875 (18 Stat. L. 482), That the right of way through the public lands of the United States is hereby granted," etc.
>
> "Act of August 30, 1890 (26 Stat. L. 391). There is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States."

The term in each case is right of way. In the case of the Northern Pacific Railroad Company vs. Townsend, 190 U. S. 267, the Supreme Court has held that the right conveyed by this expression is a conditional fee on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. Under the well known rule of construtcion that all ambiguities in such statutes are to be determined in favor of the Government and against the grantee and that such grants are to be strictly construed against the grantee and reservations therein liberally construed in favor of the Government, the right reserved to the Government by the description right of way for ditches or canals constructed by the authority of the United States can not be held to reserve to the United States any less right than is conveyed to the railroad company by the same descriptive words in the act of March 3, 1875. In other words, the title of the Government to such rights of way certainly can not be held to be anything less than a conditional fee but may and probably is to be held to be something more or better than that. It is certainly a stronger title in this respect, that it is not subject to forfeiture by non-use, as is the title conveyed to the railroad company under the Railroad Act.

But in this case it is not necessary for the Government to rely on any point about which there can be any reasonable difference of opinion and therefore for the purpose of this argument we may concede that the right of way reserved by the act of August 30, 1890, is an easement as urged by our opponents and to proceed with the argument on that issue.

You may consider the Government's rights under the act of August 30, 1890, as an easement, or, if you like, may disregard the Government's rights under that act altogether, and the Government still has a fee simple estate.

All of the land occupied by the Government ditches was occupied and used by the Government and the ditches and canals actually constructed by the Government long prior to the construction of the railroad line, and in a number of cases the land occupied by the Government ditches was occupied and used by the Government prior to the entry of the settler from whom the railroad company claims title.

Such actual occupation and use by the Government preserves the original Government title to the Government just as effectively as if the land had been withdrawn under the first form of the Reclamation Act, or for an Indian, or military reservation, or any other purpose authorized by law.

For example, take the first lift main canal, some times referred to as "C canal." The stipulation in regard to this canal is that it was built under the authority of the United States under the provisions of the act of Congress of June 17, 1902 (32 Stat. L. 388), during March and April, 1908 (see paregraph 2 of the stipulation on page 87 of the transcript), and that the reclamation homestead entries referred to were made on the dates shown on the map attached to the defendant's answer herein (see paragraph 28 of the stipulation, page 96 of the transcript). The map in question shows with respect to the entry of this tract that it was made by Edward R. Guyman, homestead entry No. 03106 on July 12, 1909, and at a still later date he conveyed a right of way to the railroad company. In this case the settler's entry was made over a year after the land was occupied by the Government and the canal actually constructed.

That the original Government title is a fee simple title requires no argument; it is in fact the origin of all fee

simple titles in this country, and so far as the first lift canal is concerned, it is evident that the original title has been preserved.

> "Now, that the land in question has been appropriated in point of fact, there can be no doubt for the case agreed states that it had been *used* from the year 1804 until and after the institution of this suit, as well for the purpose of a military post as for that of an Indian agency with some occasional interruption. *Now this is appropriation for that is nothing more or less than setting apart the thing for some particular use.*"
>
> Wilcox vs. Jackson, 13 Peters 498, 512.
>
> Scott vs. Carew, 196 U. S. 100.

It is clear that power to withdraw lands from entry was granted to the Secretary of the Interior in order to prevent appropriation by private citizens *in advance* of the actual occupation and use by the United States, but that the Government is not precluded, irrespective of an order of withdrawal from appropriating the land by actual taking of possession.

The same rule has guided the decisions of the land office.

In re Davis, 5 L. D. 376:

> "Lands segregated by military occupation. Wilson Davis. The establishment and occupancy of a cantonment by the military authorities, excludes from entry, prior to the formal order of reservation, the land thus appropriated. Acting Secretary Muldrow to Commissioner Sparks, January 20, 1887.
>
> "I have considered the appeal of Wilson Davis from the decision of your office, dated July 25, 1885, holding for cancellation his pre-emption cash entry No. 105 of the W½ of the NW¼ and the N½ of the SW¼ of Section 6, Township 47 North, Range 8 West, N. M. Meridian, made October 2, 1883, at the Gunnison Land Office, in the State of Colorado, so far as the same conflicts with the military reserve, as shown by

the supplemental township plat approved July 15, 1884.

"The facts appear to be substantially set forth in the decision appealed from, and it is shown that the land in controversy was within the limits of the Ute Indian reservation, formerly occupied by the White River and Uncompahgre Ute Indians in Colorado, which was declared to be public land of the United States and subject to disposal for cash under existing laws, by Act of Congress, approved July 28, 1882 (22 Stat. 178).

"It appears that the township plat of survey embracing said land was filed on March 23, 1883; that Davis filed his pre-emption declaratory statement for said tracts on July 9, 1883, alleging settlement March 27, 1882, and cash certificate was issued upon his final proof on October 2, 1883. It further appears from the statement in said decision and from an inspection of the records of your office that the land in controversy was occupied by the United States military authorities in 1804 as a cantonment.

"In response to an inquiry from your office, the Secretary of War, on November 18, 1882, transmitted the report of Judge Advocate General relative to the status of the land within the late Uncompah[illegible] vation, reported as having been laid off by the military authorities in the Uncompahgre Valley and called the cantonment, in which it was held that by virtue of the treaties made by and between the United States and the Indians, dated October 7, 1863 (13 Stat. 673), March 2, 1868 (15 Stat. 619) and September 18, 1873, said cantonment was properly located on said Indian reservation; that, although the reservation for the cantonment was not in fact declared by the President, yet the land was in good faith legally appropriated, and therefore segregated from the public domain, and that said cantonment should be considered a military reservation, and the land embraced therein should not be considered subject to disposal as other public lands under said Act.

"The Secretary of War concurred in the views expressed by the Judge Advocate General. Your office held that the establishment of said cantonment and the occupation thereof by the military authorities, acting

under the authority of the Commander in Chief, the President, must be regarded as legal, and that the reservation must be considered as established by law, so as to exempt the lands embraced therein from entry under the pre-emption laws.

"It is urged that the formal order of the President, declaring said reservation, was not made until after Davis had made his said entry, but that can make no difference, if the land embraced in said entry was in fact included in said cantonment, and the same had been established by law and was in the actual occupation of the military authorities at the time of his said entry, the entry must be considered illegal, so far as it covers land within the limits of the cantonment.

"A careful examination of the record discloses no good reason for disturbing said decision, and it is accordingly affirmed."

In re Davis, 5 L. D. 376.

To the same effect is—

Mather vs. Hackley's Heirs, 19 L. D. 48, 52.

"By the terms of the proviso of the act of March 12, 1860, extending the provisions of the swamp land grant to the State of Minnesota, said grant is not operative as to any lands that prior to selection by the State have been reserved, sold or disposed of pursuant to any law enacted prior to said act."

"It is not necessary to constitute an Indian reservation that a treaty or act of Congress shall specifically describe the lands that are reserved. It is sufficient for such purpose if the lands occupied by the Indians are recognized by the officials of the Government as reserved Indian lands."

In re State of Minnesota, 22 L. D. 388.

"Lands which for a long period of time have been with the knowledge and acquiescense of the Government included in the site of a reservoir used as a feeder of a canal in the maintenance and operation of which the Government is interested are not 'unappropriated public lands' and are therefore not subject to the homestead entry."

In re Longnecker, 30 L. D. 186.

To the same effect is—

In re Longnecker (on review) 30 L. D. 611.

And to the same effect is a very recent case—

In re Northern Pacific Railroad, 38 L. D. 496.

The public lands actually occupied and used by the Government as an irrigation canal constructed and operated under the provisions of the Reclamation Act are appropriated by the Government, are not unappropriated public land and are therefore not subject to homestead entry nor to subsequent appropriation by a railroad company. The land is as fully reserved by the actual occupation and use of the Government as it would be if withdrawn under the first form of the Reclamation Act or under any other act for any Government purpose.

And the retention in the Government of the title to the works constructed under the Reclamation Act is expressly directed by that act:

> "That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provision of this act: *Provided,* That when the payments by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided,* That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress."
>
> Sec. 6 Reclamation Act.

Until otherwise provided by Congress, the only thing which can pass from the Government under any conditions, is the management and operation of the irrigation works and that only after the payments for the major portion of the lands have been made. On this project it is agreed that no part of the cost of construction has been paid. So the Government retains the management and control of all the works as well as the title thereto and will do so for a long time to come.

It is plain that, so far at least as the first lift main canal is concerned, the Government has retained its original fee simple estate and by actual occupation and use for a purpose authorized by law has reserved it from appropriation by individuals or corporations.

The action of the railroad company in taking possession of this land and constructing bridges and fences and railroad grades and other structures thereon is a continuing trespass which can not be excused by the mere statement that the company does not intend to obstruct the flow of the water in the canal.

Respectfully submitted,

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